Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD
AND LARRY J. BROUSSARD,

Petitioners,

VERSUS

VERMILION CORPORATION,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Brief on Behalf of Vermilion Corporation,
Opposing the Petition of Norman Vaughn,
Freddie Broussard and Larry J. Broussard

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**Brief on Behalf of Vermilion Corporation,
Opposing the Petition of Norman Vaughn,
Freddie Broussard and Larry J. Broussard**

Respondents, Vermilion Corporation, oppose the Petition for Writ of Certiorari to the Supreme Court of Louisiana filed herein by the Petitioners, for the following reasons:

I.

STATEMENT OF THE CASE AND MATERIAL FACTS

Respondent is the Lessee of and is in possession and control of certain lands in Vermilion Parish, Louisiana which is described in Exhibits which are part of the record of these proceedings. Exxon is the owner of the property in question, but Respondent is strictly a lessee and is not a "management arm" of Exxon as suggested by Petitioners on page 3 of their petition. There are numerous canals on the property, which are used as the primary means of transportation from one point to another within Respondent's leasehold, since the land is primarily marshland and water travel is the most suitable form of transportation within the leasehold. The canals are used for transportation purposes by sub-lessees and others with written permission from the Respondent. The canals in question were constructed by the present owner, and its ancestors in title, exclusively with private funds, and exclusively within the boundaries of their private property. Since the canals were built, they have been continuously supervised and controlled by Respondent, and by Respondent's lessor, and its ancestors in title.

The Petitioners have on repeated occasions, and after warnings from Respondent's warden, engaged in commercial fishing and/or shrimping activities on the canals within Respondent's lease, without the permission of Respondent. Respondent filed for an injunction and damages against the Petitioners, alleging that Petitioners had trespassed on the leasehold. Petitioners filed a petition for removal of those suits to the Federal District Court for the Western District of Louisiana. The removal was successfully opposed by Respondent, based on the fact that the petition did not state a Federal question, but was based solely on State law.

Petitioners then answered these lawsuits, pleading that the canals are navigable waters of the United States, and subject to use of the public, and in particular the Petitioners. Copies of the State Court pleadings were attached as Exhibits to the petition for writs. However they did not include the pleadings involved in the attempted removal. Respondent has attached these in the Appendix to this Brief as A-1.

Respondent filed a motion for summary judgment in the Trial Court, based on the ground that there was no material issue of fact presented or properly pleaded. All parties agreed that the canals were constructed solely on private property with private funds, and they have been possessed and controlled by Respondent its lessor and their ancestors in title. The fact that Petitioners used the canals without permission was not disputed, nor was it disputed that the canals are capable of certain types of navigation. However, contrary to the implications of Petitioners' arguments, Respondent has never made any admission of the legal status of the canals, as "navigable in law" or "navigable waters of the United States".

The trial judge granted the summary judgment, holding on State law grounds that the canals are private property of Respondent, and subject to private control. Petitioners appealed their case to the Court of Appeal, Third Circuit, State of Louisiana, and the decision of the Trial Court was affirmed. The application for Writ of Certiorari to the Louisiana Supreme Court filed by Petitioners was denied. Therefore the Louisiana Supreme Court did not rule on this case.

II.

ARGUMENT

A. OPPOSITION ON JURISDICTIONAL GROUNDS

This Court should not grant writs of certiorari, since the case below was decided and controlled by State law. The original petition filed by Respondent in the Trial Court was based on State law, as recognized by the Federal District Court when it remanded the case to State Court. The Trial Court's decision was obviously based on State law, citing the Louisiana Supreme Court case of ***Ilhenny v. Broussard,*** 172 La. 895, 135 So. 609, (1931) and the decision of the Louisiana Third Circuit Court of Appeal in ***National Audubon Society v. White,*** 302 So. 660, 1974, writ denied 305 So.2d 542 (1975). These cases determined the status of artificial canals built in the same area or locality as Respondent's canals.

The opinion of the Third Circuit Court of Appeal, attached as Exhibit A-3 of the petition, indicates that its decision was primarily based on State law. The Court in its opinion discussed the Louisiana cases on the subject matter and found on page A-11 "We therefore find no error on the part of the Trial Court in granting summary judgment in favor of the Plaintiff." and at page A-15 "We are convinced that the decision of ***National Audubon Society v. White*** was correct and apply it to this case. We hold that a canal on private property constructed and maintained with private funds and used for private purposes is a private canal subject to private control." Only after reaching the above conclusions, did the Third Circuit discuss the Federal law cited by Petitioners' brief, and distinguished the Federal cases cited from this litigation. No area of Federal law has yet attempted to preempt the issue of ownership and control of privately built and owned canals, not dedicated to public use,

and therefore the case was properly decided on adequate and independent State law grounds.

It is settled law that the Supreme Court will review a decision of the State Court only where it affirmatively appears from the record that a Federal question was presented to the highest State Court having jurisdiction and its decision on the Federal question was necessary to the determination of the cause, and where the decision may have been either on a State ground or on a Federal ground, and the State ground is sufficient to sustain a judgment, the Supreme Court will not undertake to review that judgment. ***Durley v. Mayo,*** Fla. (1956) 76 Sup. Ct. 806, 351 U.S. 277, 1 L.Ed. 2d 69.

In the case at hand, the highest court of Louisiana, the Louisiana Supreme Court, did not rule on this question, but simply denied the application for a writ of certiorari, which is discretionary within that court. The case of ***Stembridge v. State of Georgia,*** (1952) 72 Sup. Ct. 834, 343 U.S. 541, 96 L.Ed. 1130 held that where the highest Court of a State delivers no opinion, and it appears that the judgment might have rested upon a non-Federal ground, the United States Supreme Court will not take jurisdiction to review the judgment.

Several other cases stand for the proposition that if the judgment on the State Court was based on a decision of State law which was broad enough or adequate enough to support the State Court decision, the Supreme Court will not consider the Federal question, and will not grant writs, even though the Federal question was considered and determined by the Court below adversely to the plaintiff in error. See the case of ***Consolidated Turnpike v. Norfolk, Etc. Railroad Company,*** Va., (1913) 33 Sup. Ct. 605, 228 U.S. 596, 57 L.Ed. 982; ***Jankovich v. Indiana Tollroad Commission,*** Indiana, (1965) 85 Sup. Ct. 493, 379 U.S. 487, 13 L.Ed. 2d 439; ***Dixon v. Duffey,*** Cal. (1951) 72 Sup. Ct. 10, 342 U.S. 33, 96 L.Ed. 46;

Young v. Ragan, (1949) 69 Sup. Ct. 1073, 337 U.S. 235, 93 L.Ed. 1333; *McCoy v. Shaw*, Okl. (1928) 48 Sup. Ct. 519, 277 U.S. 302.

B. LOUISIANA STATE LAW CLEARLY HOLDS THAT RESPONDENTS ARE ENTITLED TO THE RELIEF GRANTED

The Louisiana appellate court in its opinion pointed out that the case at hand is similar to the one presented in *National Audubon Society v. White*, supra. The lands of the National Audubon Society are adjacent to those within Respondent's leasehold and its canals are in the same system and are almost identical to the ones involved in the case at hand. Likewise, the Rockefeller Wildlife Sanctuary, which is contiguous to Respondent's leasehold on the West, has the same system of canals. Their canals were constructed with private funds upon private property, and used for certain navigational purposes. The property was donated to the National Audubon Society for the establishment and operation of the Paul J. Rainey Wildlife Sanctuary. The National Audubon Society sued for and obtained an injunction preventing the defendant from using the canal. If the Court had ruled in favor of Petitioners, it would also open those sanctuaries to trespass and poaching to an unmanageable degree, because their canals connect with and are part of the same canal system as Respondents'.

The Court in *Audubon* found that a canal built entirely upon private property, and with private funds for private purposes, is a private thing, as in the case of a private road built on private property. Even though a canal is capable of sustaining some forms of transportation, it can still be privately owned if it is not dedicated to the public use or expropriated. The Court referred to LSA-C.C. (the Louisiana Civil Code) Articles 449, 450 and 453 which state that navigable rivers, highways, and the beds of rivers, are classifed as being "common" or "public"

things. The Court ruled that these classifications do not apply to canals constructed with private funds on private property, because it cannot be said that the ownership of the canal "belongs to nobody in particular" as provided in LSA-C.C. Art. 450, or that title to the canal became vested in a whole nation.

The Court based its opinion partially on a Louisiana case entitled *Ilhenny v. Broussard*, supra, a decision of the Louisiana Supreme Court involving the same canal. The Louisiana Supreme Court had actually decided the same issue many years before in the case of *Harvey v. Potter*, 19 La. Ann. 264 (1867). The Court stated in that case:

> "It is not easy to perceive how, in such a case, the public becomes seized of the right to the gratuitous use of advantages afforded by individual labor and enterprise. The right of expropriation, it is true, belongs to the public and the land and the canal so constructed upon it might, under Constitutional and legal provisions become public property and be appropriated to public use . . .
>
> "Private property shall not be taken for public uses, without ample renumeration first made to the owner. This is a fundamental principal. So it would seem clearly to follow that private property cannot be used by the public without compensation for that use. Perhaps Congress may have the power and jurisdiction over all navigable waterways, whether public or private, but the Fifth Amendment to the United States Constitution provides, and it is a fundamental law of our State and Nation that private property cannot be taken without just compensation."

Neither the State of Louisiana nor the Federal Government has chosen to exercise powers of expropriation over Respondent's canals, they have not been dedicated for public use, and therefore they are still subject to State law, which recognizes the ownership of Respondent.

C. RESPONSE TO PETITIONERS' ARGUMENTS ON QUESTION 1 OF ITS PETITION

Petitioners' first argument contends that if a private citizen develops a system of artificial navigable canals on his property, and in doing so destroys a pre-existing navigable waterway, then the public is entitled to a "navigation servitude" on the artificial waterway. Petitioners argue that this is the case we are dealing with, and thus they have the right to use Respondent's canals.

This Court should note from the onset that this defense was not plead by the Petitioners, as is necessary under Louisiana Procedural law. A review of the answers to these lawsuits, copies of which were attached to the Petition, will clearly show that these facts were not plead. LSA-C.C.P. Article 1005 states:

> "The answer shall set forth affirmatively arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, division, duress, error or mistake, estoppel, extinguishment of the obligation in any manner, failure of consideration, fraud, illegality, injury by fellow servant, transaction or compromise, and any other matter constituting an affirmative defense . . ."

It is Respondent's contention that the argument raised in Question No. 1 of the Petition for Certiorari was not properly raised as an issue in State Court, and therefore is not before this Court.

Petitioners did sign an affidavit opposing Respondent's motion for summary judgment which made some reference to a pre-existing navigable canal. This affidavit, a copy of which was attached to the petition as Exhibit E, did not have the effect of bringing this properly as an issue in this lawsuit, since no affirmative defense was plead, nor were any facts set out in any pleading which raised this defense. Furthermore the affidavit did not meet the requirement of Louisiana law relating to these affidavits. Article 967 of the Louisiana Code of Civil Procedure states that:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matter stated therein . . . When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided above, must set forth ***specific facts*** showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate shall be rendered against him." (Emphasis added.)

A review of the affidavit signed by the Petitioners reveals that the affidavit does not state ***specific facts*** within Petitioners' personal knowledge that raise material issues for trial. The affidavits state that petitioners were "aware" that there were two natural streams in the "area of Pecan Island" which ceased to be usable after the private canal system was developed. The facts were not alleged to be within the affiant's personal knowledge, nor did the affiants allege any facts which would relate the development of the private canal system with any previously existing natural waterways. Respondents suggest that no such facts were sworn to because affiants knew of none, nor do

any exist. Therefore, the Petitioners have not properly raised Question 1 of their petition for a writ of certiorari. Even if Question 1 were considered, Petitioners did not cite any authority for this proposition in their argument, nor did they cite such authority in their arguments to the State courts. Rather, the thrust of Petitioners' argument both under Questions 1 and 2 of their brief are directed at the proposition that there is no such thing as a privately owned navigable waterway, and this argument is treated below.

D. OPPOSITION TO PETITIONERS' ARGUMENTS UNDER QUESTION 2 OF THE PETITION FOR WRITS

Petitioners contend that it is impossible for a private citizen to own a navigable canal, and further contend that all navigable waters are burdened with a "navigation servitude" in favor of the public. Although this is stated as Question 2 of their petition, Petitioners made this argument in various parts of their petition. Respondent has shown above that the law of Louisiana is that a navigable canal can be owned by a private person, so the State courts were correct in their decision, and there is no reason for this Court to review a judgment based on adequate and sufficient State law.

Petitioners based their arguments in large part upon the case of *United States v. Kaiser-Aetna,* 408 Fed. Sup., 42 (1976). Respondent contends that the Petitioners have misinterpreted that case, and that a proper reading of that case reveals that it supports the contentions made by Respondent herein.

The *Kaiser* case was a suit by the U. S. Army Corps of Engineers for a declaratory judgment to determine whether or not the developers of a private marina in Hawaii had to secure a permit from the Corps of Engineers for future construction, excavation, and filling in of the marina. The suit was also for

an injunction to prevent the marina owners from interfering with public access to the waters of the marina. In that case, unlike the case at hand, the marina was a natural waterway, and was not created by artificial means. However it had been considered under State law as private property, even though it was connected to other navigable waters such as Maunalua Bay, which was a navigable waterway of the United States. The pond was developed in or around 1961 by private investors, and was dredged so as to increase its navigable capacity, in connection with private subdivision developments. The pond covered 523 acres, was navigable and subject to the tides.

The government contended that the pond was a navigable water of the United States for two reasons (1) that the pond was navigable in its natural state, and (2) that subsequently the pond became navigable by later developments, and thus became a navigable water of the United States subject to the "navigation servitude".

The Court first discussed whether or not the pond was navigable in its natural state, and those discussions are not really relevant to the proceedings at hand, since we are not dealing with a natural stream, but with an artificial waterway. The quotation on page 15 of the petition for writs discussing the "ebb and flow" theory and unique Hawaiian laws, was taken from the Court's discussion of whether or not Kuapa pond was navigable in its natural state and has no application to the case at hand. We are not dealing with the ownership or development of a natural stream. However the quotation which begins on page 13 of the petition for writs is relevant. Petitioners did not choose to include the entire quotation in their argument, but Respondent feels that it should be reviewed in its entirety and carefully studied.

The Court stated:

"The term 'navigability' has many legally distinct applications. (1) It may determine ***title*** to river and lake beds. (2) It has been the touchstone of Congressional ***jurisdiction*** over waters via the Commerce Clause. (3) It embodies the ***navigation servitude***, a modern declaration of the Common Law right of public access to the surface of waters. In addition, (4) admiralty jurisdiction in Federal Courts flows from the general concept of navigability. The use of the term 'navigability' for these four purposes, however, does not necessarily mean that each is co-extensive with the other. See ***United States v. Applician Electric Power Company***, 311 U.S. 377, 408, 61 Sup. Ct. 291, 85 L.Ed. 243 (1940). Therefore any reliance upon judicial precedent must be predicated upon careful appraisal of the ***purpose*** for which the concept of 'navigability' was invoked in a particular case. In this suit, plaintiff is seeking a determination that the Hawaii-Kai Marina is within Congressional jurisdiction as exercised and implemented by the Rivers and Harbors Act, and that the waters of the Marina are subject to the navigation servitude."

Therefore it is clear that the Court held that the term "navigability" can be used for different purposes, and simply because a body of water is navigable for one purpose, does not mean that it is navigable for other purposes.

After determining that the pond was not navigable in its natural state, and had always been considered under Hawaiian law as private property, the Court went on to determine the status of the pond after its development as a navigable waterway. The Court clearly recognized that it is very possible indeed for a navigable body of water to be privately owned. This case refutes Petitioners' contention that there is no such thing as a

"private navigable waterway". The ***Kaiser*** case clearly held that the pond was privately owned, even if it was navigable in fact, and even if it was subject to the jurisdiction of Congress within its power to regulate interstate commerce, and subject to regulation by the U. S. Army Corps of Engineers. The Court held that although the pond may have been navigable for purposes of Federal ***jurisdiction***, it was not a navigable water of the United States insofar as the "navigation servitude" was concerned. The two do not necessarily go hand in hand. The Court concluded the following:

"Federal admiralty jurisdiction has long been held to apply to artificial waterways that in fact form highways of commerce between States or into foreign commerce, over which vessels actually pass. Thus a ***privately owned waterway*** may come within the term 'navigable waters of the United States' as used in Section 10 of the Rivers and Harbors Act if it in fact supports interstate commerce. The Federal government has an intense interest in the quantity and safety of commercial traffic moving in interstate commerce, whether over natural or artificial channels, and possesses the Constitutional authority to regulate them." (Emphasis added.)

The court held that the waterway could be privately owned and controlled, even though it is a "navigable water of the United States" for the purposes of maritime jurisdiction or Congressional regulation.

"This determination that the waters of the marina are subject to Federal regulation, however, does not resolve the problems of this dispute.

B. Regulation v. Full Use of the Navigation Servitude

> As indicated above, the dominant Federal navigation servitude arises from the Common law ***public*** right to pass over ***naturally*** navigable waters. Because under Common law no private property right exists in such waters, therefore there is no private 'right' to be 'taken' by government action.
>
> Here, however, as stated above, there never existed any public rights in or to the waters of Kuapa pond, nor did its transformation into the present marina, by private funding, create, ipso facto, any ***public*** rights therein or thereto."

No doubt, the Petitioners misinterpreted the holding of that case when they argued that it stood for their proposition that navigable canals cannot be owned. The navigation servitude does not attach to all navigable waterways, and in particular does not attach to privately owned canals which have always been privately owned. If a ***natural*** waterway can be improved so that it becomes navigable, and still be considered private, then ***a fortiori*** an artificial navigable waterway can be built, on private property with private funds, without automatically imposing upon it a "navigation servitude".

The "navigation servitude" obviously only applies to public waters, and does not apply to privately owned rights. Louisiana has long considered a navigable canal built on private property with private funds as a private thing, as opposed to the Louisiana Civil Code definitions of "public things" or "common things". The ***Kaiser*** decision is very similar to the Louisiana jurisprudence relied upon by the State courts, as illustrated by the following excerpt from that case:

> "Nevertheless, while Congress may provide for the improvement and regulation of navigation, and take

> necessary action to prevent interference or obstruction to navigation, it cannot impose a ***public*** navigation servitude upon such a privately constructed waterway without paying a reasonable compensation for the use thereof."

That has long been the law in Louisiana, as ennunciated in ***Harvey v. Potter,*** supra, and other Louisiana cases which have been cited herein. The Court in ***Kaiser*** stated:

> "Here then since Kuapa Pond has been transformed into navigable waters used in commerce, the marina has therefore become subject to regulation by Congress and within admiralty jurisdiction. It does not follow, however, that the United States can, without payment, appropriate those waters for ***public*** use and deprive the defendants of their investment or any return on it.
>
> "If the government wants the marina open to free public use, the defendant must be paid. This the government has not done."

In summary, Respondent contends Petitioners' request for writs should be denied since this case was decided by the State Courts below on substantial questions of State law which were adequate to support the State Court's judgment. In addition, Respondent contends that the Petitioners never properly plead the issue which it argues, that previously existing navigable streams were interfered with by Respondent's artificial canals. Finally, Respondent takes the position that even though the decision below was made on State law grounds, that both State and Federal law on the subject clearly support the previous judgments made in this matter, and therefore there is no necessity for further review.

RESPECTFULLY SUBMITTED,

COOPER & SONNIER

BY: Charles R. Sonnier pwm.a.s.
CHARLES R. SONNIER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief Opposing Petition for Writ of Certiorari and Attachments have been duly mailed to counsel for Petitioners, Mr. John K. Hill, Jr., P. O. Drawer Z, Lafayette, Louisiana 70502.

Abbeville, Louisiana, September 1st, 1978.

John E. Ortego pwm.a.s.
JOHN E. ORTEGO

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF VERMILION

BEFORE ME, the undersigned authority, Notary Public in and for the aforesaid Parish and State, this 25th day of August, 1978, personally came and appeared:

JOHN E. ORTEGO, to me personally known, who on his oath did depose and say:

That he is the attorney of record for Relators in the foregoing matter; that he has prepared the foregoing Brief Opposing Petition for Writ of Certiorari; that the allegations of fact contained therein are true and correct to the best of his knowledge, information and belief.

Appearer further declares that a copy of the above and foregoing Brief Opposing Petition for Writ of Certiorari has been duly mailed to counsel for petitioners, Mr. John K. Hill, Jr., by depositing a copy thereof in the United States Mail, properly addressed and postage prepaid on the 1st day of September, 1978.

/s/ John E. Ortego
JOHN E. ORTEGO

SWORN TO AND SUBSCRIBED BEFORE ME THIS 1st DAY OF SEPTEMBER, 1978, AT ABBEVILLE, LOUISIANA.

/s/ Paul J. Hebert
NOTARY PUBLIC

NOTARY SEAL

EXHIBIT A-1 (IN GLOBO)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

IN RE:

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

15th JUDICIAL DISTRICT COURT

NUMBER: 35948

VERMILION PARISH, LA

PETITION FOR REMOVAL

TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE DIVISION:

Petitioner, NORMAN VAUGHN, a major domiciliary of Vermilion Parish, Louisiana, respectfully represents:

1.

Petitioner is the defendant in the above entitled Louisiana State Court action, which was filed and commenced in the 15th Judicial District Court of Vermilion Parish, Louisiana, on

November 7, 1975, and is now pending in that Court. Process - the petition of Vermilion Corporation and citation - was served on petitioner on the 17th day of November, 1975.

2.

The said State Court action is a civil action for injunction and damages against petitioner Vaughn wherein the plaintiff, Vermilion Corporation, asks that appearer be enjoined from allegedly "trespassing" upon a canal alleged by the Vermilion Corporation to be "private" in nature, but which canal is in fact and in law navigable, and further constitutes navigable waters of the United States.

3.

The Vermilion Corporation in said state court action further alleges that, in his use and navigation of said canal, petitioner has taken shrimp therefrom, and seeks to recover in damages for the taking of said shrimp.

4.

The claim of the Vermilion Corporation squarely falls within the admiralty and maritime jurisdiction of this Court under 28 U.S.C.A. 1333, as to both its prayers for injunction and damages, and further arises out of, is founded upon, or otherwise is governed exclusively by 33 U.S.C. 403, in that the Vermilion Corporation's suit for injunction, if taken arguendo as true and valid in its allegations, seeking to prevent an obstruction to the navigable capacity of the waters of the United States, or, and in truth and in fact, seeks itself to create an obstruction not affirmatively authorized by Congress to the navigable capacity of waters of the United States via seeking to enjoin a citizen of the United States from use of its navigable waters. Thus, the pending state court claim of the Vermilion

Corporation is also a civil action of which this Court has original jurisdiction founded upon a claim or right arising under the laws of the United States, and should be removed pursuant to 28 U.S.C. 1441(b).

5.

Appearer's alleged reducing of shrimp to possession from the alleged private canal in itself constitutes navigation thereof, and the claim for money damages for removal of said shrimp thus also constitutes an attempt to impose an obstruction to the navigable capacity of waters of the United States in violation of 33 U.S.C. 403. Alternatively, and should the Court feel that the claim for injunction is removable, but that the claim for damages would not be if sued upon alone, or vice-versa, then and in that event the entire state court case should be removed, pursuant to 28 U.S.C. 1441 (c).

6.

Copies of all process served upon appearer to date are attached hereto.

7.

Appearer files herewith a good and sufficient bond conditioned as the law directs, and will make payment of all costs and disbursements incurred by reason of this removal proceeding if this Court should determine that this action was not removable or was improperly removed thereto.

WHEREFORE, Appearer, NORMAN VAUGHN, prays that this cause be removed to this, the United States District Court, for the Lafayette Division of the Western District of Louisiana.

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70501
COUNSEL FOR NORMAN VAUGHN

STATE OF LOUISIANA

PARISH OF LAFAYETTE

JOHN K. HILL, JR., Attorney at Law, in and for the Parish of Lafayette, Louisiana, being duly sworn by me, Notary Public, on his oath deposes and says that he is attorney for petitioner herein, Norman Vaughn, and that he has prepared the foregoing petition and that the contents thereof, and the matters and things mentioned therein are true and correct to the best of his knowledge, information and belief.

/s/ John K. Hill, Jr.
JOHN K. HILL, JR.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 3rd DAY OF DECEMBER, 1975.

/s/ Thelma Claire Bienvenu
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

VERMILION CORPORATION

VERSUS CIVIL ACTION NO.

NORMAN VAUGHN

MOTION TO REMAND

Now into court comes Vermilion Corporation, plaintiff in the above case removed to this court by the defendant, Norman Vaughn, who now moves to remand the suit to the 15th Judicial District Court, Parish of Vermilion, Louisiana, in which this matter was pending at the time of such removal, upon the following grounds:

1.

The plaintiff denies the allegations of the petition for removal that this court has original jurisdiction of this case under either 28 USCA 1331, federal question jurisdiction, or under 28 USCA 1333, admiralty and maritime jurisdiction.

2.

If this court finds that the claim of petitioner falls within the admiralty and maritime jurisdiction of this court under 28 USCA 1333, then plaintiff alleges that the matter is not removable to federal court by virtue of 28 USCA 1441B, which provides that any action which is not within the federal question jurisdiction of the court is removable only if none of the

parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

3.

In the petition for removal filed herein, it was admitted that the defendant, Norman Vaughn, is a domiciliary of Vermilion Parish, State of Louisiana. Therefore the suit may not be removed unless the petition is based upon a claim arising under the Constitution, laws, or treaties of the United States.

4.

Petitioner denies that its petition asserted a cause of action which arose under the Constitution, laws or treaties of the United States, but rather, the claim of Vermilion Corporation was based on the Louisiana trespass and tort laws. It is specifically denied that the original petition states a claim found upon 33 USC 403, as alleged by paragraphs 4 and 5 of the defendant's petition for removal. The original petition did not allege that the defendants created any obstruction to navigation.

5.

The cause herein was improperly removed in that it is properly within the jurisdiction of the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, and the matters asserted and the complaint filed in that court did not represent a claim or right arising under the Constitution, treaties or laws of the United States, nor is there diversity of citizenship.

6.

Plaintiffs herein further moves the court to order the payment to the plaintiff by the defendants of all costs and disbursements, including attorney's fees, incurred by reason of the removal proceedings.

WHEREFORE, the plaintiff prays that this case be remanded to the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, in accordance with the requirements of 28 USCA 1447 (c).

RESPECTFULLY SUBMITTED

COOPER & SONNIER

BY: /s/ Charles R. Sonnier
Charles Sonnier
Attorney for Vermilion Corporation
Abbeville, LA 70510

* CERTIFICATE OF SERVICE *

I certify that I have served a copy of the foregoing pleading on all counsel of record herein by mailing a copy to said counsel this day.

Abbeville, La., 6 - 18, 19 76.

/s/ Charles R. Sonnier, Attorney
Cooper & Sonnier
121 East St. Victor
Abbeville, La. 70510

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

VERMILION CORPORATION

VERSUS CIVIL ACTION NO. CI-751289

NORMAN VAUGHN

FILED: February 23, 1977

JUDGMENT ON MOTION TO REMAND

IT IS ORDERED that the motion of the plaintiff, VERMILION CORPORATION, to remand this cause to the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, Docket No: 35,948, be, and the same is hereby sustained.

It is therefore, ordered that this cause be remanded to the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, as not properly removable to this Court.

Lafayette, La. this 23rd day of Feb., 1977

/s/ W. Eugene Davis
U. S. DISTRICT JUDGE

JUDGMENT READ AND RENDERED in Open Court on December 8, 1976, in Lafayette, Louisiana and signed in Lafayette, Louisiana, on this the _____ day of _____, 1977.

* CERTIFICATE OF SERVICE *

I certify that I have served a copy of the foregoing pleading on all counsel of record herein by mailing a copy to said counsel this day.

Abbeville, La., 2/16, 19 77.

/s/ John E. Ortego, Attorney
Cooper & Sonnier
121 East St. Victor
Abbeville, La. 70510